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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK WILLIAMS, ROBERT H. CRIST and D. EUGENE THORNE, *Petitioners*,

v.

TIMOTHY MILONAS, JR. AND KENNETH RICE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. May a federal court enjoin, under the Federal Civil Rights Act, therapeutic treatment procedures of a private institution where those procedures are not regulated, coerced or even encouraged by any state agency?

2. Does a private instiution become a "state actor" for all purposes under the Fourteenth Amendment and 42 U.S.C. § 1983 simply because it has some contracts with state agencies or is subject to limited state regulation in areas unrelated to the practices challenged?

3. May the federal courts substitute their judgment of what are "necessary" or "appropriate" treatment procedures for the judgment of concerned parents who, with the advice and recommendations of qualified professionals, have selected and consented to private therapeutic treatment procedures for their children?

4. Is it unconstitutional for parents, with the advice and recommendations of qualified professionals, to subject their minor child to a therapeutic treatment program which includes, under some circumstances, (1) utilizing a polygraph; (2) monitoring and restricting mail; (3) utilizing "time-out" rooms; and (4) utilizing some physical restraint when necessary?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Defendants Jack L. Williams, Dr. Robert H. Crist and D. Eugene Thorne petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals(App. A, *infra*, 1a-28a) is reported at 691 F.2d 931 (10th Cir. 1982). The memorandum opinion of the District Court for the District of Utah (App. B, *infra*, 33a-102a) is not reported.

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*All parties appearing before the Tenth Circuit are named in the caption. Plaintiffs Milonas and Rice, through their attorney and guardian ad litem, appeared on behalf of themselves and as representatives of a class of all students at Provo Canyon School, past, present and future.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 13, 1982. On November 9, 1982 that court denied petitioners' timely motion for rehearing with suggestion for rehearing en banc. (App C, *infra*, 103a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983 provides in pertinent part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

STATEMENT

This suit was brought by the American Civil Liberties Union in September, 1978, in the names of two former students of the Provo Canyon School. It is an individual action for damages and a class action for injunctive relief under 42 U.S.C. § 1983. Plaintiffs sought compensatory damages and one million dollars in punitive damages. They also sought an order closing Provo Canyon School, or alternatively, an injunction prohibiting thirteen allegedly unconstitutional treatment procedures.[1]

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[1] In October, 1979, plaintiffs' counsel also filed an identical companion case, *Horton, et al. v. Williams, et al.*, Civil No.

Defendants Jack L. Williams, Dr. Robert H. Crist, and Dr. D. Eugene Thorne are the owners and administrators of the Provo Canyon School.

This case was tried to a jury for nineteen trial days days in March, 1980. The jury returned a unanimous verdict in favor of the defendants on every issue. Nevertheless, the district court, having reserved the class action claims for injunctive relief, concluded that the School's administrators were state actors by virtue of a symbiotic relationship with the state. The district court then enjoined four of the procedures utilized in the School's therapeutic program: the use of polygraph tests; the monitoring of student mail; the use of "time-out" rooms; and the use of physical restraint except under specified circumstances. (App. B, *infra*, 31a-32a.) The district court found plaintiffs to be the "prevailing parties" under 42 U.S.C. § 1988 and awarded them costs, including attorneys' fees of $133,546.00.[2]

On appeal the Tenth Circuit affirmed the decision of the district court.

Provo Canyon School is a privately owned and operated facility,[3] established for the treatment *and* edu-

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C-79-0723J, seeking compensatory and punitive damages on behalf of additional named plaintiffs individually and as representatives of a class of all past, present or future students of Provo Canyon School. *Horton* has been stayed by the district court pending a final determination of the present case.

[2] This amount has now grown to approximately $200,000.00. *See* Section "*B*" and n. 8, *infra*.

[3] The School is a private corporation owned solely by defendants Jack L. Williams, Dr. Robert H. Crist and Dr. D. Eugene Thorne. The physical facilities are owned by a partnership comprised of these same three individuals.

cation of adolescent boys with problems so severe as to require a structured, therapeutic environment. All of the boys enrolled in the School suffer serious emotional or behavorial disorders (App A, *infra*, 6a), often coupled with educational disorders or learning disabilities. Many of the boys have engaged in criminal behavior. The School's professionally-developed therapeutic treatment program applies a system of rewards or punishments, based upon a student's behavior, and has been highly successful in most cases.

A majority of the boys enrolled in Provo Canyon School are placed there by their parents. (App. A, *infra*, 7a). Some are placed pursuant to written contract by or through juvenile courts, probation departments and school districts which have determined in each individual case that the boy cannot function in a less restrictive environment or that the programs at Provo Canyon School have a reasonable probability of elevating a boy's educational level and treating his behavioral disorders. The School's procedures are fully disclosed and explained to parents or guardians and no boy is admitted unless the parent or guardian consents to the use of those procedures. (App. B, *infra*, 73a.)

A full accounting of all sources of funding to Provo Canyon School over the years 1973-1979 reveals an average of less than 23% coming from contracts with government-related entities. (*See* App. A, *infra*, 5a-6a n.4.) And notwithstanding the receipt of some tuition and other payments from federal and state agencies or school districts, it is undisputed that *no governmental agency or employee participated in any way in the formation of the challenged treatment procedures.*

The School's educational program is subject to a variety of federal and state regulations under the Education for All Handicapped Children Act, 20 U.S.C.

§ 1401, *et seq.* (1976). Again, however, no state regulations control or even affect the School's therapeutic program, including the challenged treatment procedures. In fact, the district court repeatedly expressed concern with the *failure* of the state to regulate or monitor the School's therapeutic program. (*See* App. B, *infra*, 65a-66a.)

REASONS FOR GRANTING THE PETITION

In two recent cases, *Rendell-Baker v. Kohn*, 50 U.S. L.W. 4825 (U.S. June 25, 1982) and *Blum v. Yaretsky* 50 U.S.L.W. 4859 (U.S. June 25, 1982) (both of which were decided after the district court's opinion in this case) this Court reaffirmed the principle that acts of private parties generally may be considered to be "state action" for the purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 only when there exists a clear and direct nexus between those acts and the state.

In this case, however, the court of appeals held that all actions of the private Provo Canyon School, even those entirely unrelated to any governmental regulation, were taken under color of state law. The court of appeals inappropriately distinguished its decision from *Rendell-Baker*, and failed altogether to apply *Blum v. Yaretsky*. The court of appeals' decision is squarely contrary to recent decisions of this Court and merits summary reversal.

The Tenth Circuit's decision has an extremely broad and detrimental impact on the private parent-child relationship, including the parents' "high duty to recognize symptoms of illness and to seek and follow medical advice." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). A majority of the boys at Provo Canyon School have been placed there by their parents after consultation with qualified, independent professionals. The tuition

of most boys enrolled at the School is paid totally by their parents. Nevertheless, under the decision of the court of appeals, the federal judiciary has allowed two adolescent named plaintiffs, having no personal stake in the outcome,[4] to dictate other boys' treatment programs. The court has substituted its judgment for that of parents and professionals based upon a finding that some governmental contracts, some governmental regulations, and some governmental funding, all unrelated to the enjoined practices and unrelated to those boys, justifies federal intervention into all activities of the school.

By holding that the enjoined practices violated constitutional rights of students at Provo Canyon School, the court of appeals affirmed a strained consitutional analysis by the district court which failed to accord any weight to the fact that the enjoined practices (1) were developed, administered and supported by medical professionals and other qualified experts, and (2) were consented to by the parents of all the boys placed in the School. Furthermore, the court of appeals' decision contradicts important recent decisions of this Court holding that due process may be satisfied by the exercise of reasoned professional judgment, and that decisions of parents, relative to the treatment and well-being of their children, are to be accorded great weight in considering any alleged constitutional deprivations. *Youngberg v. Romeo*, 50 U.S.L.W. 4681 (U.S. June 18, 1982); *Parham v. J. R., supra.*

The decision by the court of appeals, (1) approves the district court's substitution of its judgment for that of qualified, medical professionals and concerned par-

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[4] The two named plaintiffs, Milonas and Rice, demanded to be removed from the School the day this action was commenced. They were removed and have never returned to the School.

ents, and (2) identifies "new" constitutional rights. Its decision will substantially chill the appropriate exercise of such professional and parental judgment.

A. *The "State Action" Finding in the Present Case Conflicts With Recent Supreme Court Decisions.*

In this case the district court, affirmed by the court of appeals, found that "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions." (App. A, *infra*, 16a.) The district court found this joint participation so complete as to give the color of state law to *all* actions of the Provo Canyon School.

This Court recently defined the standard for determining whether a private entity is subject to suit under Section 1983 as whether "the alleged infringement of federal rights [is] *'fairly attributable to the state'*," *Rendell-Baker*, 50 U.S.L.W. at 4828 (emphasis added). The Tenth Circuit acknowledged this principle (App. A, *infra*, 16a), but dismissed *Rendell-Baker* as inapplicable to its analysis in this case, and failed altogether to mention an important companion case, *Blum v. Yaretsky*, *supra*. In so doing, it avoided clear rulings by this Court that the conduct of private parties may be subject to the constraints of the Fourteenth Amendment as action taken "under the color of state law" *only* under very limited circumstances.

This Court in recent years has reaffirmed the fundamental principle announced nearly a century ago in the *Civil Rights Cases*, 109 U.S. 3 (1883), that private activity may not be deemed "state action" without a clear and *direct connection* between the state and the specific acts in issue. *E.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (there must be "a sufficiently close nexus *between the state and the challenged action* of the regulated entity so that the action of the latter may fairly be treated as that of the state itself" (emphasis added)).

Only a few cases have found broad state action without regard to the specific act complained of. Those few cases involve unique facts and are clearly exceptions to the general rule, and are not applicable here.

One such approach, articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and recognized but distinguished in *Jackson v. Metropolitan Edison Co., supra*, is the "intertwinement" test. Under this test the court looks to the existence of such *extensive* state regulation combined with the performance of a public service as to find a "symbiotic relationship" between the private entity and the state. In such cases "the state will be held responsible for conduct with which is had no direct connection." *Downes v. Sawtelle*, 574 F.2d 1, 8-9 (1st Cir.), cert. denied 439 U.S. 910 (1978). A second approach is the so-called "public function" or "delegation" doctrine, which is applied only when the state has delegated to a private entity a function so closely associated with the state, so "traditionally exclusively reserved to the State," *Jackson*, 419 U.S. at 352, that a private entity also assumes the state's constitutional obligations.

It is apparent from its decision in this case that the court of appeals failed to appreciate the distinction between the exceptional case and the generally required focus on the direct connection, if any, between the state and the specific activity challenged. Here, the lower courts' application of either the "intertwinement" or the delegated "public functions" tests was inappropriate and conflicts with standards articulated in this Court's decisions. The result of this broadened state action approach is to allow intervention by the federal judiciary into purely private relationships — a dangerously inappropriate result.

1. *"Public function."*

The district court ruled that defendants' actions were deemed to be actions of the state because Provo Canyon School performs the "public function" of education. (App. B, *infra*, 59a). The Tenth Circuit accepted this conclusion, holding that "the district court's finding that the defendants . . . were acting under color of state law . . . is in accord with applicable law." (App. A, *infra*, 16a.) The court of appeals misapplied the law in reaching this conclusion.

As this Court has stated, in order to attribute the acts of a private facility like Provo Canyon School to the state under the "public function" doctrine,

> the relevant question is not simply whether a private group is serving a public function. We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State."

Rendell-Baker, 50 U.S.L.W. at 4829, quoting *Jackson*, 419 U.S. at 353. This Court rejected the public function approach in *Rendell-Baker* because, even though "there can be no doubt that the education of maladjusted high school students is a public function," it is not *exclusively* so. Contrary to the statement by the court of appeals, the district court's finding in this case *does not* conform with that law. As the Second Circuit has observed, education "has never been a state monopoly in this country." *Powe v. Miles*, 407 F.2d 73, 79 (2nd Cir. 1968). *See also Jackson*, 419 U.S. at 354 n.9

2. *"Joint Participation."*

The Tenth Circuit's opinion stated further that "the State has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions," (App. A, *infra*, 16a, citing *Burton*, 365 U.S. at 715.) It pointed to four principal factors leading to this conclusion: (1) that many of the students at the School were placed at the School involuntarily by various state agencies; (2) that many school

districts placing boys at Provo Canyon School agreed to detailed contracts drawn up by the defendants; (3) that there was significant state funding of tuition; and (4) that there was extensive state regulation of the School's educational program. (App. A, *infra*, 16a.) Such factors simply do not disclose a degree of state involvement amounting to a *Burton-type* "insinuation". The court of appeals' conclusion that the state-school intertwinement justified attributing to the state conduct over which it had no actual control is directly contrary to *Rendell-Baker*.

The First Circuit's opinion in *Rendell-Baker v. Kohn*, 641 F.2d 14 (1st Cir. 1981), identified four factors "which have tended to weigh heavily" in analyzing the "intertwined" relationship requisite to state action under *Burton*: (1) use of public property; (2) public selection of private trustees to administer a state activity; (3) expression of intent by the state to treat a disputed entity as arms of the state; and (4) placement of a public institution in private hands with the actual purpose of evading constitutional requirements. *Rendell-Baker*, 641 F.2d at 23.[8] None of these four factors is present in this case.

Provo Canyon School is privately owned and operated upon private property by private administrators. The School does not contract with public agencies as to some of its individual students and is by reason of these contracts subject to regulations relating to its *educational* program. Nevertheless, such public con-

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[8] The *Rendell-Baker* decision involved a private school similar in character to Provo Canyon School, but dependent almost entirely upon state funding and subject to extensive state regulation. Despite the "considerable degree of cooperation between the state and the school," however, the First Circuit was not persuaded that it could "justify a finding that the challenged action occurred under color of state law." 641 F.2d at 23-24. This Court affirmed.

tracts are insufficient to support a finding of state action:

> Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Rendell-Baker, 50 U.S.L.W. at 4828.

Even where public contracts result in "extensive and detailed regulation," there is no state action unless the specific activity complained of is *compelled* by said regulations. *Id.* The practices enjoined herein were not compelled, or even encouraged, by any government regulation, yet the court of appeals did not even address this issue.

In *Rendell-Baker*, the combination of nearly total public funding, extensive state regulation and the educational nature of the services provided by New Perspectives School was not sufficient to establish a *Burton*-type symbiotic relationship or otherwise to convince this Court that the state should be held responsible for any of the school's activities over which it had exercised no direct power or control. The "intertwinement" test has very limited application. In instances such as this one — just as in *Rendell-Baker*—where the facts fall short of satisfying that test, the court may attribute private action to the state only if there is a "sufficiently close nexus between the State *and the challenged action*." Jackson, 419 U.S. at 351 (emphasis added).

3. *This Court's recent decision in* Rendell-Baker *and* Blum v. Yaretsky *require reversal herein.*

In view of this Court's direct treatment of the state action issue in *Rendell-Baker*, the Tenth Circuit's conclusion that *Rendell-Baker* "does not control the Section 1983 issue before us" (App. A, *infra*, 17a) is wrong. The standards and approach of *Rendell-Baker* cannot fairly be avoided; *Rendell-Baker* does control the issue.

In *Rendell-Baker*, this Court concluded that even though there was direct state involvement in many of the school's activities, there still was not such a pervasive relationship between New Perspectives School and the government that *all* of the school's actions could fairly be attributable to the state. The Court then considered whether the state could be held *directly* responsible for the challenged action. It concluded that the facts failed to establish the direct nexus necessary to find state action because the challenged conduct was not encouraged or coerced by the state.

The fact that the challenged actions in *Rendell-Baker* did not involve students — the "beneficiaries" of the state regulation — is the sole basis upon which the Tenth Circuit distinguished *Rendell-Baker*.[6] The court of appeals did not even address the undisputed critical fact in this case that the enjoined practices were not coerced or even encouraged by any state agency.

Just as in *Blum v. Yaretsky*, which found no state action in professional decisions which clearly did affect the beneficiaries of state regulation, *Rendell-Baker* focused on the challenged activity, not on the identity of the plaintiffs. Clearly, a challenged activity may affect the beneficiaries of *some* governmental regulation and yet still have insufficient connection with the state to be deemed state action.

The *Rendell-Baker* decision recognized that the New Perspectives School's role as an employer was separate from its role as an educator and that, although the school was subject to extensive state regulation in the area of education, the state had no direct regulatory

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[6] The court of appeals expanded upon an observation in the First Circuit's opinion that students *might* have a better chance of arguing state action than teachers did. This dictum does not justify the Tenth Circuit's total shift of focus from the action complained of to the identity of the plaintiff.

control or coercive power over the school's personnel policies or practices: "[I]n contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Rendell-Baker*, 50 U.S.L.W. at 4828-29.

That is precisely the same situation as in the present case: Provo Canyon School is both an educational and a therapeutic treatment facility. It is subject to regulation of its educational program, but the regulators have shown no interest in its therapeutic program or practices.[7] These latter activities, including the decision to develop and utilize the enjoined procedures, are private in every sense of the word, and the law relative to such decisions could not be more clear:

> [A] state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Blum v. Yaretsky, 50 U.S.L.W. at 4862 (citing other cases). This rule was ignored in the Tenth Circuit's analysis.

The state has exercised no coercive power over Provo Canyon School's therapeutic practices, and a finding that "some of [the plaintiffs in this case] have been involuntarily placed in the School by state officials who were aware of, and approved of, certain of the practices which the district court has now enjoined" (App. A, *infra*, 17a) falls far short of finding "significant encouragement" relative to these private decisions. In the language of the Supreme Court "[*m*]*ere approval of or acquiescence in the initiatives of a private party*

[7] The district court in fact found that, despite the extensive regulation of some aspects of the School, the state had actually failed to monitor the School and had overlooked the enjoined practices and procedures. (App. B, *infra*, 65a-66a; 97a.)

is not sufficient to justify holdin gthe State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 50 U.S.L.W. at 4862 (emphasis added).

In *Blum v. Yaretsky*, this Court held that notwithstanding Medicare funding and extensive state regulations of nursing homes, there is *no state action* in decisions by physicans and nursing staff concerning the level of care required by individual patients. In this case, just as in *Blum*, the practices complained of are the results of "judgments made by private parties according to professional standards that are not established by the State." *Id.* at 4863. Likewise, here as in *Rendell-Baker*, "the critical factor is the absence of any allegation that the [challenged activity] was itself based upon some rule of conduct or policy put forth by the State." *Rendell-Baker*, 50 U.S.L.W. at 4829 (White, J. concurring).

B. *The "State Action" Finding in the Present Case Results in an Inappropriate Award of Attorneys' Fees Under 42 U.S.C. Section 1988.*

The court's finding of state action permitted it to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S. C. § 1988. Under this authority, the defendants now face potential liability to the plaintiffs of approximately $200,000.00,[8] notwithstanding that (1) the jury found unanimously against plaintiffs, no cause of action, and awarded plaintiffs no damages; (2) plaintiffs failed in their attempt to have the School closed; and (3) plaintiffs ulti-

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[8] The district court awarded plaintiffs costs and attorneys' fees of $133,546.00. With accrued interest and an additional $24,789.07 in costs and attorneys' fees requested by plaintiffs in connection with the appeal to the Tenth Circuit, the individual defendants now face a potential liability to plaintiffs of approximately $200,000.00.

mately obtained injunctive relief as to only four of thirteen allegedly unconsitutional practices of the School. That the district court's finding of state action results in such a fee award against the defendants under the facts of this case further supports the position that this was not a proper case for finding state action.

The purpose of the fee award provision is not to punish unsuccessful defendants acting in good faith, *Pickett v. Milam*, 579 F.2d 1118 (8th Cir. 1978), but to help shift the costs of bringing the action to those who are deemed to be the ultimate beneficiaries thereof. A grant of attorneys' fees to plaintiffs "prevailing" under Section 1983 thus is most appropriate when the award is granted against individuals for whom the state must stand ultimately responsible. Because such fee awards are ultimately borne by the taxpayers — the "public" which is deemed ultimately to benefit from an action in the "public interest" — the burden is not great upon any single individual or entity.[9] This justification fails, however, as and to the extent that the

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[9] The committee reports on Section 1988 from both houses of Congress demonstrate that it was not anticipated that the fee award provision would apply to this type of case. According to the House Report (H.R. Rep. No. 94-1558), "Section 1983 is utilized to challenge *official* discrimination, such as racial discrimination imposed by law, . . . [and] has also been employed to challenge unlawful *official* action in non-racial matters." *Id.* at 4-5 (emphasis added). It further reasoned that the "substantial resources available to governmental entities and officials through funds in the common treasury, including the taxes paid by the plaintiffs themselves, . . . provide an ample base from which fees can be awarded to the prevailing plaintiff. *Id.* at 7. The Senate Report (S. Rep. No. 14-1011) observes that "[i]n such cases it is intended that attorneys' fees like other items of costs, will be collected directly from the official, in his official capacity, from funds of his agency or under his control or from the state or local government entity (whether or not the agency or government is a named party)." *Id.* at 5.

state becomes less accountable for the actions of the named defendant.

Plaintiffs prevailed in this case only because the district court determined that the actions of the defendants could be fairly attributable to the state. The fee award under Section 1988 was not granted against the state, however. Nor was it granted against the named defendants in an "official" capacity, since the defendants are not officials of the state. The end result is that the burden of the fee award, if it stands, may not be spread through the taxpaying public as anticipated by Congress in enacting the Civil Rights Fee Awards Act. It becomes the individual burden of three private professionals, Dr. Crist, Dr. Thorne, and Mr. Williams. In that regard it allows plaintiffs to recover significant damages through the back door even though they were denied any direct damage recovery by the jury.

The result is in fact the reverse of the anticipated effect of a fee award in a Civil Rights action. Plaintiffs here were directly supported by ACLU "public interest" monies, plus federal funds provided to the Juvenile Justice Legal Advocacy Project. The fee award in the present case has shifted the burden from this broad public or quasi-public base to three named private individuals .One of these individuals, Dr.D. Eugene Thorne, became directly involved with the Provo Canyon School only *after* plaintiffs had obtained a preliminary injunction against the same four procedures now at issue. He was named as a defendant only because, as new director of the school, he was a necessary party for purposes of any permanent injunctive relief. Nonetheless, the court of appeals upheld the fee award in its entirety against Dr. Thorne. Dr. Thorne and Dr. Crist were subsequently required to post their individual homes as security in lieu of a supersedeas bond in order to pursue an appeal in this case. Such a result

cannot have been intended by § 1988 and demonstrates that the underlying finding of state action is inappropriate and should be reversed.

C. *The Tenth Circuit Court's Decision Conflicts With Constitutional Principles Beyond the State Action Issue.*

1. *The exercise of professional judgment satisfies due process.*

Even if there had been a clear showing of state action in this case and the restrictions of the Fourteenth Amendment were therefore relevant, the holding that the challenged actions deprived plaintiffs of constitutional rights conflicts with relevant Supreme Court cases.

This Court has recently held (subsequent to the district court's ruling in this case) that the due process requirement of the Fourteenth Amendment is satisfied if professional judgment is exercised: "[T]he decision, if made by a professional, is presumptively valid." *Youngberg v. Romeo*, 50 U.S.L.W. at 4684. *See also Parham v. J. R.*, 442 U.S. at 607; *Bell v. Wolfish*, 441 U.S. 520, 544 (1979) (courts should not " 'second-guess the expert[s] . . . on matters on which they are better informed' ").

Qualified expert testimony at trial in this case demonstrated the legitimate therapeutic treatment applications of polygraph testing and the "time out" rooms, the beneficial results of the mail policy and the reasonableness and necessity of using occasional physical restraints. Experts produced by plaintiffs offered contrasting opinions, but their testimony was based on purely philosophical differences and was unsupported by either professional experience or research data. The record suggests no more than that experts could disagree. There was absolutely no basis therein for a conclusion that the challenged actions served no beneficial or con-

structive purpose. The trial court's critical remarks about the School's use of the polygraph and its mail policy, quoted in the Tenth Circuit's opinion (App. A, *infra*, 19a-20a), ignored the substantial evidence of the legitimate, beneficial uses and purposes of these procedures. As the Supreme Court has observed, in language well suited to this case:

> The Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made. . . . [*W*]*e emphasize that courts must show deference to the judgment exercised by a qualified professional.* By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized, Moreover, *there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.*

Youngberg v. Romeo, 50 U.S.L.W. at 4684-85 (emphasis added).

2. *Parental consent satisfies due process.*

By concluding that the challenged practices were "unnecessary" to Provo Canyon School's overall program, the district court not only substituted its own judgment for that of qualified professionals, but it laid a faulty foundation to support its further conclusion that "the defendants may not deprive members of the plaintiff class of constitutional rights . . ., *even with parental consent.*" (App. B, *infra*, 98a [Conclusion of Law No. 11] (emphasis added).)[10]

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[10] The erroneous state action conclusion was apparently also necessary to this conclusion. According to the district court, because "state action is so intertwined with all aspects of the operation of the Provo Canyon School that the school *as a whole*

The district court made no attempt to balance these important competing interests. It thus effectively but erroneously avoided the established principle, based on the "traditional presumption that the parents act in the best interests of their children," *Parham v. J. R.*, 442 U.S. at 604, that great weight should be given to the role of parents or guardians in the selection of a particular institution and in their consent to a particular method of treatment. *Id.* As the Supreme Court has observed, "*most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*" *Id.* at 603 (emphasis added). This Court has consistently recognized that the parents' claim of authority necessary "to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

In *Parham*, this Court held that due process was satisfied where parents, in conjunction with independent medical professionals, determined that their child should be treated in a state mental institution, even though that decision "is not agreeable to a child or because it involves risks." 442 U.S. at 603. Similar parental decision-making has been vetoed by the lower courts in this case.

3. *The enjoined practices do not violate constitutionally protected rights as those practices are reasonably related to legitimate objectives of Provo Canyon School.*

Aside from the issues of state action and parental or professional judgment, there are important and specific rights-oriented issues of constitutional law raised

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operates under color of state law, . . . even 'voluntary' parental decisions or parental consent are subject to constitutional scrutiny." (App. B., *infra*, 74a.)

by this case. While the trial court acknowledged the constitutional standards of *Bell v. Wolfish*, 441 U.S. 520 (1979), and their applicability to this case, those standards were not correctly applied. *Bell* dismissed "compelling necessity" as the standard justifying infringements of constitutional rights of pretrial detainees. It noted that in light of the difficulties of prison administration, restrictions infringing even on *recognized* constitutional guarantees must be evaluated against legitimate institutional objectives, and adopted a test of "reasonable relationship" to effect the appropriate balancing. The district court correctly recognized the breadth of the legitimate objectives of Provo Canyon School and its officials in this case, encompassing "residential treatment, therapy or rehabilitation, in conjunction with education," in addition to the need for effective administration. (App. B, *infra*, 74a.) Nevertheless, the district court incorrectly applied, or failed to apply, the "reasonable relationship" standard of *Bell* to the present case.

The trial court apparently presumed illegitimate purposes for each of the practices and enjoined them on that basis. The court of appeals affirmed with little additional discussion. This decision totally discounted a substantial record of expert testimony and evidence supporting the legitimate and effective therapeutic purposes and beneficial results of the enjoined practices. The district court gave no weight to that evidence as required by *Bell*. The result was an inappropriate intrusion by the court into an area of rational and reasoned decision-making by parents and professionals.

(a) *Use of the polygraph.*

The idea to use the polygraph at Provo Canyon School came from an article in a professional journal and from an understanding that it had been used successfully in other similar schools. Its legitimate thera-

peutic role in the School's treatment program was supported by lay and expert testimony.[11]

The district court revealed the complete substitution of its own judgment for the decisions of parents and qualified professionals in referring to the polygraph as a "device [which] is inherently coervice and [which] represents the most serious intrusion into the very thought-process of an individual," used "to chill even individual thought and to chill expression of thought" — "an 'instrument of terror' rather than therapy." (App. B, *infra*, 76a).

The court of appeals did not point to a specific provision of the Constitution violated by use of the polygraph, and its use certainly is not unconstitutional *per se*. Where there is no *clear* abuse of constitutional right, and where qualified professionals have selected this method of therapeutic treatment with parental consent, the standards of *Bell* and *Youngberg v. Romeo*, *supra*, require the court to defer to the judgment of the professionals. The court of appeals' failure to give deference to these professionals and parental choices requires reversal by this Court.

(b) *Mail restrictions.*

The district court enjoined all monitoring of outgoing mail. (App. B, *infra*, 99a.) The lower court, upheld by the court of appeals, failed altogether to apply the reasonable relationship test, even though it stated that such a test was required to analyze this issue. Instead of considering the possible objectives of the mail monitoring policy and balancing these values against the burden of any alleged deprivation, the district court described the policy from the outset as self-serving and constitutionally impermissible — simply

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[11] Sample excerpts from the trial transcript of testimony supporting the use of the polygraph are reproduced at App. D, *infra*, 106a-111a.

"another vehicle for preventing any criticism of the school." (App. B, *infra*, 77a.)

It is important to recognize the role of the mail policies in the realization of the broad and difficult objectives of the Provo Canyon School program, and due deference should be given, as it was in *Bell, Youngberg, Parham,* and *Procunier v. Martinez,* 416 U.S. 396 (1974), to the parental and professional judgment in these difficult areas and the rational nexus between the policies formulated and legitimate objectives. Evidence that the mail monitoring policies were not unreasonably oppressive and that they achieved beneficial results consistent with and thus reasonably related to the legitimate purposes of the school was uncontroverted on the record.[12] Those policies were approved by parents. Even so, this evidence was apparently afforded little weight against the substituted judgment of the trial court and court of appeals.

(c) *Use of "time-out" rooms.*

The constitutional basis for the district court's decision to prohibit the use of the "time-out", "prescription rooms" or "P rooms" "for any reason other than to contain a juvenile who is physically violent and dangerous to himself or others," (App. B, *infra*, 100a) is not clearly stated in the court's findings or conclusions, or in its memorandum opinion. The court apparently believed that their use was not carefully enough controlled or subject to standards as clear as those applied by other institutions, or that existing standards were not always observed. (App. B, *infra*, 78a.) Even if the latter were true, instances of inapproprate use cannot justify the court's broad proscription, depriving the school of appropriate uses of the rooms as well,

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[12] Sample excerpts from the trial transcript of testimony supporting the school's mail monitoring practice is reproduced at App. D, *infra*, 111a-114a.

as supported by expert testimony.[13] The district court has again substituted its judgment for that of professionals, contrary to the law stated in *Bell* and *Youngberg*.

(d) *Use of physical restraint.*

The district court's injunction against the school's use of physical force is overly broad, prohibiting the use of physical force for *any* purpose other than to restrain a physically violent student or to overcome physical resistance.[14] As such, the injunction restricts the school officials' own privilege under common law to impose reasonable but not excessive force to discipline a child. As this Court acknowledged in *Ingraham v. Wright*, 430 U.S. 651 (1977), "[t]he prevalent rule in this country today privileges such force as a teacher or administrator reasonably believes to be necessary for [the child's] proper control, training or education." *Id.* at 661.

A further lesson from *Ingraham* was likewise ignored — the clear intimation from this Court that proper recourse for unprivileged use of physical force lies in the state courts under appropriate tort or criminal law, and not in the federal courts under Section 1983.

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[13] For example, Dr. Paul Whitehead, Chairman of the Department of Child Psychiatry at Primary Children's Medical Center in Salt Lake City, Utah, testified that the use of quiet rooms "is a reasonable method of obtaining control for a boy who's out of control," and explained that "the theoretical basis is to take an uncontrolled child and place them in an area of low stimulus to help them regain control."

[14] The district court itself acknowledged in its opinion that the "hair dance" — the name given to a method of physical restraint by which a student is held by one arm and the hair of his head—is "designated as a means of controlling physically violent juveniles without causing them undue physical harm." (App. B, *infra*, 78a). Use of this procedure for purpose other than to control violent students was contrary to school policy.

See also Paul v. Davis, 424 U.S. 693 (1976); *Baker v. McCollan*, 443 U.S. 137 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the court of appeals is manifest in light of this Court's opinions in *Rendell-Baker*, *Blum*, *Jackson*, *Youngberg*, *Parham* and others, the Court should consider summary reversal.

Respectfully submitted,

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